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## MEMORANDUM

**TO:** Committee on Legal Services

**FROM:** Esther van Mourik, Office of Legislative Legal Services

**DATE:** December 12, 2016

**SUBJECT:** Rules of the Taxpayer Service Division, Department of Revenue,  
concerning mandatory electronic funds transfer, 1 CCR 201-4 (LLS Docket  
No. 160055; SOS Tracking No. 2015-00333).<sup>1</sup>

### Summary of Problem Identified and Recommendation

Section 39-26-105.5, C.R.S., requires any vendor whose annual liability for state sales tax is more than \$75,000 to remit all state and local sales taxes via electronic funds transfers (EFT). The statute does not allow any exceptions. The statute also specifies that the "executive director may promulgate rules to effectively implement this section. . . ." But Rule 39-26-105.5 (4) of the Department of Revenue allows the department to grant an undue hardship exception to the electronic funds transfers requirement if the executive director is satisfied that good cause exists to grant a waiver. **Because Rule 39-26-105.5 (4) conflicts with the statute, we recommend that Rule 39-26-105.5 (4) of the department concerning an undue hardship waiver for mandatory electronic funds transfer not be extended.**

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<sup>1</sup> Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2017, unless the General Assembly acts by bill to postpone such expiration.

## Analysis

**The statute requires, without exception, electronic funds transfers for all sales and use tax remittances for vendors with annual state sales tax liabilities of over \$75,000, but the rule allows an exception in the case of undue hardship, thus the rule conflicts with statute and should not be extended.**

Colorado sales tax law requires vendors, also known as retailers, who have a total yearly state sales tax liability of more than \$75,000, to remit all state and local sales taxes by EFT. The headnote even specifies that this is "mandatory."

**39-26-105.5. Remittance of sales taxes – mandatory electronic funds transfers.** For any calendar year commencing on or after January 1, 2002, any vendor whose liability for state sales tax only for the previous calendar year was more than seventy-five thousand dollars **shall** use electronic funds transfers to remit all state and local sales taxes required to be remitted to the executive director of the department of revenue. The executive director may promulgate rules to effectively implement this section, but shall first consult with the state treasurer to ensure that any rules promulgated do not adversely affect the ability of the state treasurer to optimize sales tax investment earnings. Such rules shall be promulgated in accordance with article 4 of title 24, C.R.S. The executive director shall not require any taxpayer required to remit sales taxes by electronic funds transfers to remit sales tax prior to the deadline specified in section 39-26-105 for taxpayers who remit sales taxes by other means. [Emphasis added.]

The rule repeats the statute, specifies how the EFT should be made, and provides a consequence if the vendor fails to use EFT. These sections of the rule clearly fall within the statute's authority to "promulgate rules to effectively implement this section." The rule then includes a section that grants an exception to the requirement to remit via EFT in the case of an undue hardship. This section of the rule conflicts with the statute because it creates an exception to the mandatory remittance method. In addition to the clear conflict with statute, this section also exceeds the grant of rule-making authority to "effectively implement" the law because implementing a mandatory law does not include allowing exceptions to it.

### **MANDATORY ELECTRONIC FUNDS TRANSFER**

#### **REGULATION 39-26-105.5**

(4) **Undue Hardship.** The Department may grant in cases of undue hardship a yearly waiver from the requirement to remit all sales tax payments by electronic funds transfer. The Department will grant such request if it determines, to the

satisfaction of the executive director, that good cause exists. Taxpayers may submit a written request to the Department each year, upon receiving notice from the Department of the requirement to make electronic funds transfer, by sending such written request to:

Colorado Department of Revenue  
Excise Unit, Room 237,  
PO Box 17087  
Denver, CO 80217-00873

- (a) Undue hardship means excessive or extraordinary hardship. Undue hardship will be determined on a case-by-case basis, will be fact-specific, and will be limited to the information provided by the taxpayer. Undue hardship cannot be established by general and conclusory statements or on a general distrust of information technology such as the Internet, electronic communications, or the security of information provided by means of electronic transfer. Undue hardship may be demonstrated by the documented general unavailability of the technology and communications systems necessary for electronic filing and electronic payment. Undue hardship may also be demonstrated on the basis of the substantial financial cost to the taxpayer relative to the amount of the tax owed by the taxpayer for the current tax year.

Compare, for example, section 39-22-604 (4), C.R.S., a similar but slightly different electronic funds transfer requirement for the remittance of income taxes:

**39-22-604. Withholding tax - requirement to withhold - tax lien - exemption from lien - definitions.** (4) (a) The executive director **may require** any taxpayer who has an annual estimated withheld tax liability of more than fifty thousand dollars to remit withheld tax by electronic funds transfer. The executive director shall promulgate rules and regulations prescribing withholding tax periods and the corresponding tax return filing and tax payment due dates. The executive director shall consult with the state treasurer regarding the formulation of such rules and regulations in order to minimize the amount of lost interest to the state general fund.

(b) The rules and regulations promulgated pursuant to this section shall not prescribe filing or withholding requirements which are more frequent or more stringent than corresponding federal requirements. [Emphasis added.]

In the case of income taxes, as exemplified by the above statute, the department is granted the authority to decide when to require EFT. In other words, the law allows room for the department to grant a waiver in the case of undue hardship. This statute, similar to the sales tax statute, also grants the executive director the authority to

promulgate rules. Pursuant to that authority, the department also promulgated a rule allowing an undue hardship exception for this particular statute during this rule cycle. That rule was approved by the Office of Legislative Legal Services. This statute clearly shows that the General Assembly is capable of granting the department the latitude to allow undue hardship exceptions to EFT remittance requirements where it intends to.

As a matter of policy, the General Assembly gave more authority to the department in the case of income tax EFT remittances as compared to sales tax EFT remittances. The differences between the statutes demonstrate that the department has the authority to offer an undue hardship waiver for income tax remittances but not for sales tax remittances. This is because the income tax remittance law is written permissively by use of the word "may" while the sales tax remittance law is written as a clear requirement by use of the word "shall".

Whether an undue hardship waiver is a reasonable policy decision and should be offered consistently is not the issue before the committee. To accomplish that result, the General Assembly could amend section 39-26-105.5, C.R.S., to reflect the language used in section 39-22-604 (4), C.R.S.

### **Recommendation**

We therefore recommend that Rule 39-26-105.5 (4) of the department concerning an undue hardship waiver for mandatory electronic funds transfer not be extended because it conflicts with statute.

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